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STATUTES.

CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE STATE OF WYOMING, H. S. RIDGELY, *and* THE MIDWEST REFINING COMPANY, *Appellants*, v. THE UNITED STATES. } No. 257.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal in this case (R. 84) is from a decree of the Circuit Court of Appeals for the Eighth Circuit, which reversed a decree of the United States District Court for the District of Wyoming, dismissing a bill (R. 1–6) brought by the United States to quiet its title to a certain tract of land in the State of Wyoming, for an injunction, an accounting and a receiver to take charge of and operate the property which contains valuable deposits of petroleum oil. Opinion, C. C. A., R. 79–83; 262 Fed. 675.

THE FACTS.

Upon its admission to the Union, the State of Wyoming, under the Enabling Act of July 10, 1890,

ch. 664, 26 Stat. 222, §4, was granted for the support of common schools sections 16 and 36 in every township, with a provision for indemnity where those sections or parts thereof had been sold, or otherwise disposed of. Section 13 (p. 224) of that Act declared that mineral lands should be exempted from the grants made thereunder.

Under the grant the State became the owner of a certain section 36, which subsequently and on February 22, 1897, was by Proclamation of the President of the United States included within the boundaries of the Big Horn Forest Reserve. R. 62–64. This of course did not affect the title of the State to the section.

Availing itself of the privilege accorded by sections 2275 and 2276, Revised Statutes of the United States, as amended by the Act of February 28, 1891, ch. 384, 26 Stat. 796 (U. S. Comp. Stats. 1916, Ann., §§ 4860 and 4861), the State of Wyoming on April 4, 1912, filed in the local land office at Lander, Wyoming, a selection list for a certain tract of land assigning as base therefor a part of said section 36.

Said sections 2275 and 2276 provided, so far as material here, that where sections 16 and 36 had been included within any reservation or had been otherwise disposed of by the United States, other lands nonmineral in character might be selected in lieu thereof.

It is conceded that the State complied with all the requirements and regulations of the Land Department in connection with the filing of the application.

When the application was received by the local officers at Lander and after the prescribed formalities had been conformed to, the application to select was forwarded to the Commissioner of the General Land Office for action.

Subsequently, but before the application was taken up for action by the Commissioner, the land applied for was included in an order of withdrawal, designated as Petroleum Reserve No. 32, Wyoming No. 8, made May 6, 1914, by the President of the United States under authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847, § 1 (U. S. Comp. Stats. 1916, Ann., § 4523). R. 60.

In view of said withdrawal, the Commissioner directed that notice be given the State of Wyoming that certification of the land to it would, if made, be with a reservation of the petroleum deposits under the Act of July 17, 1914, ch. 142, 38 Stat. 509 (U. S. Comp. Stats. 1916, Ann., §§ 4640a, b, c), unless application for classification were made, or a hearing applied for in order to show that the land was non-mineral.

The State declined to accept limited title (R. 41–44) whereupon the Commissioner held the selection for cancellation. R. 45–46. This action was affirmed by the Secretary of the Interior, upon the State's appeal (R. 46–49), and that was adhered to upon a motion for rehearing (R. 50–57), whereupon the application to select was rejected. R. 58.

After the withdrawal of the land as petroleum and after the notice of the ruling of the Commissioner of

the General Land Office that the State might elect to accept certification with reservation of petroleum deposits to the United States, the State on May 24, 1916, executed an oil and gas lease of the land it had attempted to select to one H. S. Ridgely, who assigned it to the Greybull Refining Company and that Company assigned it to The Midwest Refining Company. R. 3.

Thereafter drilling operations were commenced, 14 wells were brought in and the oil produced has been taken and disposed of by The Midwest Refining Company. At the date of the filing of the bill, January 28, 1918, it was estimated that there had then been extracted more than 100,000 barrels of oil. R. 4.

While the question of the rights of the State under this application was pending before the Land Department an agreement was entered into by that Department with the parties defendant, whereby the total gross proceeds of the oil produced, less ten cents per barrel allowed for operating expenses, were deposited in bank to abide the termination of the controversy. This agreement is still being carried out.

The bill as exhibited made only the several lessees defendants but the State of Wyoming applied for and was granted leave to intervene and answer. R. 18, 19, 29. Its answer (R. 20–28) is practically the same as the joint answer of defendants Ridgely and The Midwest Refining Company. R. 10–18.

Aside from the documentary evidence showing the status of the land and the steps taken in the Land

Department with respect to the selection list, which has been given in substance herein, the evidence (R. 30–65) consists of a stipulation (R. 30–31) to the effect that the State had good title to the base land, that the lieu land applied for was at the filing of the application unappropriated surveyed public land which as yet had not been classified as mineral, and that the State had so far as it could relinquished the base lands, but it was "not agreed by the Government to have been an actual relinquishment;" it was agreed, however, "that the State of Wyoming fully complied with any and all statutes, rules and regulations of the Land Department then existing, in so far as, if at all, such relinquishment was authorized by such statutes, rules or regulations." In other words, the stipulation as we construe it, is to the effect that the State had duly *tendered* a relinquishment of the base.

The defendants produced two witnesses who testified that at the date of the application and prior to withdrawal the land applied for was not known to be mineral in character. R. 65.

The Question Presented.

Under the record presented in this case the sole question for determination is:

> Whether in passing upon an application for selection such as the one in controversy, the Secretary of the Interior is limited to a consideration of conditions existing at the date of the filing of the application, without regard to

subsequent developments with respect to the land involved.

Propositions.

1. Until approval by the Secretary of the Interior, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

2. The withdrawal of the land as mineral, and the establishment of its mineral character prior to approval, barred acquisition thereof by the State.

ARGUMENT.

I.

Until approval by the Secretary of the Interior, no title, legal or equitable, vests in the State under a lieu or exchange selection application.

It is not denied that the State had the right to exchange, under sections 2275 and 2276 of the Revised Statutes, lands within a National Forest, to which it had previously to the forestry withdrawal acquired title, for other public lands. That question is settled by the decision of this court in *California* v. *Deseret Water, Oil & Irrigation Co.*, 243 U. S. 415, 420.

Regarding the question as to vesting of title under a lieu selection application it is well settled that no legal or equitable title vests until approval.

The case of *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, involved an application to make a lieu or exchange selection under the so-called

Forest Reserve Act of June 4, 1897, ch. 2, 30 Stat. 11, 36, § 1, which provided that one holding an unperfected claim, or a patent, to lands in a forest reservation might relinquish said lands and select an equal area of non-mineral lands from the vacant public domain. This Act, it will be observed, is strikingly like the Act here under consideration. It was asserted in that case that upon the filing of a relinquishment of the lands claimed or owned, together with an application to select other lands, the selector secured an equitable title to the lieu lands applied for and that as those lands were not at the time of filing the application and tendering the relinquishment of the base lands known to be mineral, a subsequent showing or discovery of mineral did not affect the selection rights.

In disposing of these contentions this court said (pp. 311, 312):

> The ground upon which complainant insists that it is the equitable owner of the land selected is that it has relinquished a title in fee in a forest reservation, and has selected in lieu thereof vacant land open to settlement, and that the local land officers duly accepted, received, and filed the deed of the land relinquished, and the affidavit that the land selected was non-mineral, and that the officers duly entered such selection upon the official records of the land office, and then and there certified that the land selected was free from conflict, and that there was no adverse filing, entry, or claim thereto. Complainant asserts that was

all that it could reasonably do; that nothing remained on its part to do, and that when such is the case, the equitable title vests, and it is entitled to the protection of a court of equity to preserve and defend the title so acquired.

Counsel insists that the act of June 4, 1897, constitutes a standing offer on the part of the Government to exchange any of its "vacant land, open to settlement," for a similar area of patented land in a forest reservation, and that whenever a person relinquishes to the Government a tract in a forest reservation and places his deed to the Government of record as required by the Land Department rules, and selects in lieu thereof a similar area of vacant land, open to settlement, that such offer of the Government has thereupon been both accepted and fully complied with, and that a complete equitable title to the selected land is thereby vested in the selector.

* * * * *

We do not see how it can be successfully maintained that, without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show

necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land.

* * * * *

And at page 313:

Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office ior his consideration together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.

* * * * *

Again at pages 314, 315:

> What may be the decision of the Land Department upon these questions in this case can not be known, but until the various questions of law and fact have been determined by that department *in favor of complainant* it can not be said that it has a complete equitable title to the land selected. [Italics ours.]

We regard the decision in the *Cosmos* case as decisive of the question in this case, but other authority upon this point is not lacking.

The Supreme Court of Oregon in the case of *State* v. *Hyde*, 88 Oreg. 1, considered the same question as to forest reserve selections, and speaking of the *Cosmos* case, said (pp. 15, 16):

> The court in that case was concerned particularly with the question of whether an equitable title to the selected lands had passed to the applicants. But the decision is instructive on the effect of a deed to the base lands. It is held that although the act of 1897 is a standing offer by the United States to exchange one class of lands for another, the exchange is not effected by the mere filing of the papers. In *Clearwater Timber Co.* v. *Shoshone County*, 155 Fed. 612, 620, it is held that title to the selected lands does not pass until final approval of the selection by the Commissioner of the General Land Office. If the title to the selected lands can not vest in the applicant without acceptance of the base lands by the General Land Office, it is fairly inferable that title to the base lands can not pass to the

United States until this bureau accepts the transfer. It is said in *Pacific Live Stock Co.* v. *Isaacs*, 52 Or. 54, 64 (96 Pac. 460), that:

"Neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

The construction which we place upon the decision in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, accords with its construction by the Interior Department.

* * * * *

It is squarely held by the federal court for this district in *United States* v. *McClure*, 174 Fed. 510, that title to the base lands does not pass to the United States until the deed is accepted by the General Land Office.

The principle laid down as to the vesting of title under an application to select lands within a railroad indemnity belt seems equally applicable to a filing like the one here in question.

It is well settled as to railroad indemnity lands that no title vests until the application to select is made *and* the same is approved by the Secretary of the Interior. *Sioux City & St. Paul R. R. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 408; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392.

We consider as pertinent to selections such as the one here in question, what was said concerning railroad indemnity selections in *Wisconsin Cent. R. R. Co.* v. *Price County*, 133 U. S. 496, at pages 511, 512:

The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until

> then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

In the case of *Buena Vista Land & Development Co.* v. *Honolulu Oil Co.*, 166 Calif. 71, the Supreme Court of California considered an application by the State of California, similar to and made under the same law as the one made by the State of Wyoming here, and it was held that no title passed and no vested right was acquired thereunder because the application had not been approved by the Secretary of the Interior, and that inasmuch as the land had been found to be mineral before the Secretary acted, he was without power to approve. The court in disposing of the case approved and adopted the decision of the Secretary of the Interior in a contest involving the same matter.

To the same effect are *Roberts* v. *Gebhart*, 104 Calif. 67, 69, 70, 71, and the holding of the Supreme Court of Minnesota in *Baker* v. *Jamison*, 54 Minn. 17, 27, 28.

It is important to observe that an application to select is not a selection in the sense in which the latter term is sometimes used in the adjudicated

cases. The word "selection" is often commonly used to designate *an application to select.* But in those cases where it is held that a selection vests title in the applicant the word "selection" means *approved selection.* As was said in *Wisconsin R. R. Co.* v. *Price County, supra* (p. 514): "They [selections] are not *considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.*" [Italics ours.]

It is true the filing of a selection application operates to give the selector a preference right to the land as against one tendering a filing thereafter, unless the latter is in support of a settlement or right initiated prior to the filing. *Weyerhaeuser* v. *Hoyt,* 219 U. S. 380, 387, 388, 391, 392. In other words, the one who is first in time is first in right.

It is important to note that this principle applies to the relative rights of individual claimants but not to the rights of the United States to retain title. That distinction differentiates the present case from *Weyerhaeuser* v. *Hoyt, supra,* and what is said in the opinion in that case as to the doctrine of relation and the scope of the inquiry of the Secretary of the Interior in passing upon the application must be taken in connection with the question there under consideration—the relative rights of conflicting claimants. It is also important to note that in the *Weyerhaeuser* case the application had been approved and therefore the doctrine of relation was applicable.

That the filing of an application to select does not create rights as against the United States and that

the United States does not stand in the same position as a conflicting claimant, is shown by what was said in the opinion of this court in the case of *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142. The question there was as to the relative rights of a preemption entryman and the railroad company which claimed under the so-called right-of-way Act of March 3, 1875, ch. 152, 18 Stat. 482. The company had submitted for approval by the Secretary of the Interior a map showing the station grounds to which it claimed itself entitled under section 4 of said Act. After the map had been submitted and before it had been approved, the filing of the preemptor was made. It was held that the company's rights were superior but the court in its opinion used this significant language (p. 149):

> The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled *that while no vested right against the United States is acquired until the actual approval of the list of selections*, the company does acquire a right to be pre-

> ferred over such an intervener. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, and we can add nothing to the conclusiveness of that case. [Italics ours.]

After referring to and discussing the decision in *Minneapolis &c Railroad* v. *Doughty*, 208 U. S. 251, this court further said (p. 151):

> What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the Land Office, and the approval thereof by the Secretary of the Interior—and that "*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way," refers to the non-vesting of any right *as against the United States*, and not as denying the priority of right in the acquisition of the premises as *between parties* growing out of priority of application.

But, say appellants, the State had done all that was demanded of it to complete its selection, it had conformed to all the statutory and departmental requirements, hence the Secretary in approving the selection application is limited to a consideration of the conditions existing when the State had done these things.

We do not attempt to deny the well settled rule that where one has done all that is required of him

with respect to securing a tract of public land, he acquires rights against the Government and conditions arising after that time are not to be considered in determining his right to the land. But that rule is founded upon the theory that by such compliance with the law the applicant has acquired an *equitable title* to the land; that in equity the land is his and the Government holds it in trust for him. *Wirth* v. *Branson*, 98 U. S. 118, 121; *Cornelius* v. *Kessel*, 128 U. S. 456 459; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432–434.

Obviously the rule has no application to a case in which the performance of some act by a public official is a condition precedent to the vesting of an *equitable title*. In such a case the mere fact that the applicant has performed all of the acts required of him does not suffice. The case at bar is one in which it was required that the proper officials of the Land Department should approve applications for lieu land selections. The mere filing of an application therefore did not suffice to pass the equitable title.

II.

The withdrawal of the land as mineral, and the establishment of its mineral character prior to approval, barred acquisition thereof by the State.

The withdrawal of the selected land by the President was made under authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847.

Section 1 of that Act (U. S. Comp. Stats. 1916 Ann., §4523) is as follows:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

We take it that there is no question raised as to this power of withdrawal, in general, but understand appellants' contention to be that it is inoperative as to the land here in controversy because the application antedated the withdrawal. But, as we have seen, the equitable title did not pass at all because the application was never approved.

Moreover, section 2 of the Act of June 25, 1910, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497 (U. S. Comp. Stats. 1916 Ann., § 4524), particularly enumerates the kind of claims or filings which are exempted from the force and effect of such withdrawals. That section reads:

> That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the

diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

It will be perceived that but five kinds of claims or entries are saved, viz: claims for metalliferous minerals, under the mining laws; oil or gas claims which had not proceeded to discovery but upon

which there was at date of withdrawal diligent prosecution of work leading to discovery, thereafter continued to discovery; homestead or desert land entries, and settlement claims previously initiated. Now, had Congress intended that other claims should be excepted it would have so declared.

The uniform holding of the Land Department with respect to such cases is evidenced by its Administrative Ruling in 43 L. D. 293, in which it was declared (syllabus):

> No such right is acquired by a forest lieu, railroad, or State selection, prior to approval thereof by the proper officer of the United States, as will except the land from withdrawal by the government under the act of June 25, 1910.

The Secretary said (p. 293):

> This question, therefore, is now presented: Is the Secretary of the Interior free to dispose of these selected lands, in the face of the act of Congress withdrawing them from disposition?
>
> It is my conclusion, after a careful study of the authorities, that no such authority has been given to the Secretary of the Interior. The acts of Congress authorizing exchanges are merely offers on the part of the United States to exchange other lands for lands held by the selector, and the right of the selector does not attach nor equitable title pass upon mere presentation of the requisite papers. There remains the necessity for action upon the offer by the duly authorized officer of the United States. Until that acceptance has

> been given and the equitable title passed, Congress has full authority to devote the land to a public purpose.

and (p. 294):

> Congress having power to withdraw lands and devote them to a public use, notwithstanding the existence of the inchoate claims mentioned, having authorized the withdrawals and reservations by the act cited, and withdrawals having been made for public purposes, as prescribed in the act, the Secretary of the Interior has no power or authority to approve or accept such selections or exchanges or to relieve them from the force and effect of an existing reservation.

Numerous authorities are cited to support that conclusion. P. 294.

Such a filing as the one now under consideration is obviously unlike homestead or other claims upon which final proofs have been submitted and in which the claimants have done all that is necessary under the law to vest them with an equitable title.

It is well established, also, that mere settlement upon lands of the United States with a declared intention to obtain title thereto under the preemption laws does not give a vested interest in the premises so as to deprive Congress of the power to divest it by grant to another. *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77.

This principle was approved in *Shepley* v. *Cowan*, 91 U. S. 330, although that case was distinguished from the two just cited. In that case it was said,

referring to *Frisbie* v. *Whitney* and *The Yosemite Valley Case* (p. 338):

> In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the preemption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, lighthouses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as *against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon Congress by the Constitution only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived.

The case of *Russian-American Packing Co.* v. *United States*, 199 U. S. 570, may be helpful. In that case the Packing Company, without authority

or license from the United States, took possession of a tract of land on an island off the coast of Alaska, erected buildings, machinery, etc., at a cost of about $45,000. Subsequently, an Act was passed (Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1100), which provided that a corporation such as the Packing Company might purchase not more than 160 acres of land. Under this Act the Company applied for a survey and made a deposit to cover the cost thereof; the survey was made, but before approval by the Commissioner of the General Land Office, the land was withdrawn and reserved for a fish culture station.

It further appears that by a section of the Act of 1891 it was declared that the provisions relating to acquisition of lands should not be construed to warrant the sale of any lands which should be selected for fish culture stations. The court, referring to that section (§ 14), held that regardless of that section no rights were acquired against the Government, and said (pp. 577, 578):

> Even if section 14 had not been enacted, it would not follow that petitioner, by sections 12 and 13, became entitled to a patent of the United States by procuring a survey of such lands. We have had occasion in several cases to hold that, although the occupation and cultivation of public lands with a view to preemption confers a preference over others in the purchase of such lands by the *bona fide* settler, which will enable him to protect his possession against other individuals, it does not confer a vested right as against the United States in the land so occupied. Such a vested

> right, under the preemption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. Until this has been done it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler. *Frisbie* v. *Whitney*, 9 Wall. 187. When this payment is made, the other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local land office and ultimately to a patent. *The Yosemite Valley Case*, 15 Wall. 77, 87; *Campbell* v. *Wade*, 132 U. S. 34, 38; *Shiver* v. *United States*, 159 U. S. 491.

Again, in the case of *Wagstaff* v. *Collins*, 97 Fed. (C. C. A.) 3, it was said (p. 8):

> It is urged, however, * * * that the complainants' ancestor had acquired a vested right in the land by virtue of his homestead claim and residence thereon, of which neither he nor his heirs could be deprived by subsequent legislation, and that the complainants are therefore entitled to the land, to the exclusion of the purchasers from the railway company, although Congress clearly intended to confirm the purchasers' title. We are not able to assent to this proposition. In the case of *Shiver* v. *U. S.*, 159 U. S. 491, 495, 16 Sup. Ct. 54, the doctrine was fully approved that an entry upon public land accompanied by residence thereon, in pursuance of such permission as is given by the land laws of the United States, confers no vested interest in

the land until the settler has remained in possession for the length of time or done the acts which under the law entitled him to a patent. Such a settlement, it was said, protects the settler from intrusion by others, but confers no rights as against the United States. This court in *Norton* v. *Evans*, 49 U. S. App. 669, 27 C. C. A. 168, and 82 Fed. 804, 807, also applied the same rule, that had long been applied to preemption claimants, to a homestead claimant, holding that an entry by the latter "creates no vested rights as against the United States, and does not interfere with the power of Congress by subsequent legislation to dispose of the land;" citing *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Campbell* v. *Wade*, 132 U. S. 34, 10 Sup. Ct. 9.

Appellants invoke the doctrine of relation and it is undoubtedly true that upon the issuance of a patent or the approval of an application to make a selection, the title acquired relates back to the initiatory steps taken to secure the patent or the approval. But how can it be said that the approval relates to a date antecedent to the withdrawal when there has been no approval?

The doctrine of relation involves a legal fiction by which an act performed on a given date is deemed to have been performed at an earlier date. Of course if the act is never performed the fiction can not be indulged. *United States* v. *Detroit Lbr. Co.*, 200 U. S. 321, 334.

The doctrine of relation was sought to be invoked in the case of *United States* v. *Morrison*, 240 U. S. 192. That case involved a grant to the State of Oregon of "school sections." A survey had been made in the field, that survey had been approved by the Surveyor General of Oregon, had been submitted to the Commissioner of the General Land Office who called for an additional report on a matter of detail, and this report had been furnished. Thereafter, but before formal approval of the survey by the Commissioner, which when given was without change or correction of the survey or plat, the land was temporarily withdrawn for forestry purposes.

In holding that the formal approval of the survey was necessary before the rights of the State attached to the land in controversy, this court said (p. 212):

> Again, it is urged that the survey when approved related back to the date of the grant or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey which as we have seen is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. *The doctrine of relation can not be invoked to destroy this authority.* [Italics ours.]

But there is yet another point. The selected land is *mineral in character.*

If we consider that sections 2275 and 2276 of the Revised Statutes constitute a grant, it is clear that this land can not pass to the State, since mineral lands were excepted. The case would therefore fall within the rule of *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288; *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669; *United States* v. *Southern Pacific Co.*, 251 U. S. 1; *United States* v. *Sweet*, 245 U. S. 563.

If, however, the sections be construed as conferring merely a privilege of exchange, then the case would come under the rule that until equitable title passes, in this case until approval, the matter of the character of the land is open to determination. *Leonard* v. *Lennox*, 181 Fed. 760.

Again, even if the transaction is in the nature of a contract, created by the acceptance by the State of the invitation or privilege given by the United States, we assert that the State is bound by the terms offered, one of which was that only non-mineral land might be selected. Certainly the State could not expect that its own showing as to the character of the land was to be conclusive and to bar the right of the United States, through its proper officer, from inquiring into that matter. As was said in *Roughton* v. *Knight*, 219 U. S. 537, 547: "Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency *and an assent to the particular selection made in lieu.*" [Italics ours.]

The case of *Daniels* v. *Wagner*, 237 U. S. 547, is said to be applicable. We fail to see that it has any bearing on this case.

That case arose out of erroneous action by local land office officials in rejecting a lieu selection tendered by Daniels and permitting subsequent entries to be made by others under various laws. The Land Department repeatedly instructed the local land office to allow the lieu selection, but this was not done. When the matter was before the Secretary upon an appeal from a ruling of the Commissioner of the General Land Office that the lieu selection was valid and directing that it be allowed, the Secretary found the filing regular and that it should have been allowed; but, in view of the allowance of subsequent entries, held (p. 556):

> It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition. See *Hoyt* v. *Weyerhaeuser et al.*, 161 Fed. Rep. 324.

When the case came to this court it was held that as between the rival claimants there was no discretion in the Secretary to deny a right to which one of them admittedly had become entitled. No right or power of the Government to retain title to its own lands was involved; it was merely a matter of determining which

claimant had the prior right. The decision was in effect an application of the doctrine of priority laid down in *Weyerhaeuser* v. *Hoyt*, *supra*.

Referring to the *Cosmos* case, the court in its opinion said (pp. 560, 561):

> In the first place we can discover no reason for holding that the *Cosmos* case either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case of lieu land entries, or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the *Cosmos* case it was decided that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a prerequisite to allowing a lieu entry under the Act of 1897, but that ruling has no relation to the question of the right of the Department after it had passed on the prerequisites required for the entry under the Act of 1897 and after it had decided that they had all been complied with, to deny the right of the applicant to enter and under the theory of a discretion possessed to permit a later applicant to take the land, thus depriving the first applicant of the right conferred upon him by the Act of Congress. The difference between the two is that which must obtain between the power to decide on the one hand whether the prerequisites to an entry exist and the right on the other of the Land Department after finding that an applicant has fully complied with the law and is entitled

to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done.

It is true again that in the *Cosmos* case the court declined to hold that the Department was not at liberty to determine the question as to the mineral character of the lands sought to be entered because that inquiry arose after entry and before its final allowance, a ruling which but in a different form illustrates the broad distinction which we have just pointed out. It is also true that *Weyerhaeuser* v. *Hoyt* concerned a question of the selection of indemnity lands by a railroad company under a railroad grant, but the reasoning in that case, we are of opinion, in the very nature of things is repugnant to the possibility of the possession of the discretionary power in the Department here asserted.

CONCLUSION.

It follows that the decree of the Circuit Court of Appeals was right and should be affirmed.

Respectfully submitted.

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